

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FEDERAL DEPOSIT INSURANCE CORPORATION
AS CONSERVATOR FOR INDYMAC FEDERAL
BANK, F.S.B.,

Plaintiff,

v.

ORDER
08-CV-476A

BARTH SULLIVAN BEHR, LLP, et al.,

Defendants.

The above-referenced case was referred to Magistrate Judge Hugh B. Scott, pursuant to 28 U.S.C. § 636(b)(1)(B). Plaintiff moved to dismiss the defendant's counterclaim and on October 24, 2008, Magistrate Judge Scott issue a report and recommendation recommending that the motion to dismiss the counterclaim be granted. The defendant filed a objection to the report and recommendation and the plaintiff filed a response. On July 20, 2009, this Court held oral argument on the defendant's objections.

Pursuant to 28 U.S.C. § 636, this Court must conduct a *de novo* review of the objections to the report and recommendation. Upon such *de novo* review, it became clear to the Court that the defendant does not challenge the Magistrate Judge's recommendation that his counterclaim be dismissed. Rather, the defendant challenged certain factual statements made in the report and recommendation. In light of that, the Court recommended that the defendant move to have the Magistrate Judge amend his report and recommendation so as to correct the factual errors. The defendant did so

and on September 17, 2009, the Magistrate Judge filed an amended report and recommendation. Because the Magistrate Judge has amended the report and recommended to address the defendant's objections, it appears that the defendant's objections are now moot.

Accordingly, the Court hereby adopts Magistrate Scott's report and recommendation, as amended by the amended report and recommendation, and denies the defendant's objections as moot. Further, for the reasons stated by Magistrate Judge Scott, the plaintiff's motion to dismiss the defendant's counterclaim (Dkt. No. 20 and 35) is granted.

The case is referred back to Magistrate Judge Scott for further proceedings.

SO ORDERED.

s/ Richard J. Arcara

HONORABLE RICHARD J. ARCARA
CHIEF JUDGE
UNITED STATES DISTRICT COURT

DATED: September 24, 2009